No. 01-1806

JAN 21 2003

IN THE

Supreme Court of the United States

THE PEOPLE OF THE STATE OF ILLINOIS
ex rel. JAMES E. RYAN, ATTORNEY GENERAL
OF THE STATE OF ILLINOIS,
Petitioner,

v.

TELEMARKETING ASSOCIATES, INC.,
RICHARD TROIA and ARMET, INC.
Respondents.

On Writ of Certiorari to the Supreme Court of Illinois

BRIEF OF *AMICUS CURIAE* DISABLED AMERICAN VETERANS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICUS CURIAE*

Disabled American Veterans ("DAV" or "National Organization") is a veterans service organization chartered by Congress pursuant to 36 U.S.C. § 50301, *et seq.*[1] DAV has more than 1.1 million members, all of whom are wartime-

[1] No counsel for a party authored this brief in whole or in part and no person other than *amicus* made a monetary contribution to the preparation or submission of this brief. The parties have consented in writing to the filing of this brief, and DAV has filed their letters of consent with the Clerk.

disabled veterans. DAV operates a number of charitable programs to improve the lives of disabled veterans, their dependents and survivors. DAV receives no direct government funding and relies for its support on the generosity of a grateful nation. Virtually all of DAV's contributions are in response to its direct mail campaigns. DAV is one of the largest, if not the largest, direct mail charitable fundraisers in the nation.

Although DAV does not engage in telemarketing, either directly or through the use of independent telemarketing firms, the position taken by the Attorney General of Illinois in this case poses a serious threat to DAV's direct mail fundraising efforts. The Attorney General asks that a state regulator be granted discretion to challenge as fraudulent a charitable solicitation campaign simply on the basis that the donor was not informed that the campaign in question would not itself generate much direct net revenue for charitable programs. Such discretion would place in jeopardy, *inter alia*, solicitation campaigns that are aimed at persons not currently active donors to DAV. Although such campaigns almost always operate on a break-even or loss basis, they are essential to maintaining a strong base of support. Acceptance of the Attorney General's position in this case would leave DAV vulnerable to charges of fraud each time it conducts such a "donor acquisition" campaign. Consequently, DAV has a significant stake in the outcome of this case.

SUMMARY OF THE ARGUMENT

DAV's nationwide service programs require substantial support from a strong donor base. To maintain that base, DAV must regularly conduct "donor acquisition" solicitation campaigns to replace donors who have become inactive, whether because of death or some other reason. Historically, these campaigns generate little immediate net revenue. These campaigns, essential to DAV's vitality and to its very existence, could be placed at risk if the Attorney General prevailed in this case. Thrift store operations that fund certain activities of local DAV departments and chapters around the country would also be threatened. The donor protection objectives that evidently underlie the Attorney General's position are already substantially achieved, without intrusion on First Amendment rights, by the ever-growing number of sources through which donors can make pre-contribution assessments of a charity's financial performance.

ARGUMENT

DAV welcomes the opportunity to participate in this case as *amicus curiae* and urges the Court to follow its decisions in *Riley v. National Fed'n of the Blind,* 487 U.S. 781 (1988), *Secretary of State v. Joseph H. Munson Co.* 467 U.S. 947 (1984), and *Village of Schaumburg v. Citizens for a Better Environment,* 444 U.S. 620 (1980) and affirm the judgment of the Supreme Court of Illinois. The position of the Attorney General of Illinois, stripped to its essentials, is this: if a charity knows that it will net 15% or less from a solicitation campaign and fails to share that knowledge voluntarily with donors, the solicitation campaign is open to a charge of fraud. Were this position to receive this Court's *imprimatur,* DAV's fundraising and, consequently, its nationwide service programs for disabled veterans, would be at risk. The limited fundraising programs and the local service activities of DAV departments and chapters would face even greater danger. The paternalism underlying the Attorney General's position is unnecessary. Donors not only can, but do, discover information about the financial performance of charities and are free to make contribution decisions based on that information.

I. THE ATTORNEY GENERAL'S POSITION POSES A DIRECT THREAT TO DAV'S FUNDRAISING AND TO ITS NATIONWIDE VETERANS SERVICE PROGRAMS.

A. DAV's Service Activities Profoundly Improve Veterans' Lives.

DAV is widely recognized as the nation's pre-eminent provider of services to disabled veterans and their families. The programs are many and varied, but the centerpiece in DAV's array of services is the claims advocacy program. That program is operated at more than seventy DAV offices coast to coast and in Puerto Rico at which some two hundred sixty highly trained National Service Officers offer free assistance to veterans, representing them in claims for disability compensation and related federal and state benefits. National Service Officers also represent veterans at the United States Court of Appeals for Veterans Claims. Moreover, if disabled veterans cannot come to DAV, DAV takes its services to them in a fleet of state-of-the-art offices on wheels. The impact of the DAV claims advocacy service program on veterans' lives is staggering. For example, in 2000-2001, DAV National Service Officers obtained more than $1.8 *billion* in veterans benefits for their clients.

In addition to the claims advocacy program, DAV also heads up a nationwide program to provide transportation for veterans with appointments at various health care facilities of the United States Department of Veterans Affairs ("VA"). This project, which started in 1986, is funded jointly by the DAV National Organization and participating DAV state departments and local chapters. The program has produced remarkable results. DAV has donated to VA 1,194 new vans with a value of $24 million. Just as impressive, DAV volunteers, under the direction of various DAV state departments,

have contributed 14 million hours to drive those vans 273 million miles, transporting veterans to more than 7 million medical appointments.

B. DAV's Service Program Requires the Support of a Large and Sophisticated Fundraising Operation.

DAV's financial commitments are quite substantial for a charity whose "cause" is not in the headlines on a daily basis. In fact, it costs the National Organization approximately $65 million a year to run its service programs. Unlike Respondents' client charity, DAV does not employ third-party fundraisers, nor does it utilize telemarketing to solicit contributions. Virtually all of DAV's contributions are generated through its direct mail campaigns. DAV mails roughly sixty million solicitation pieces each year, raising about $100,000,000. Although direct mail is an expensive way to raise funds, it has been the only cost-effective method for DAV. Despite the ever-increasing costs of postage and mailing materials, DAV keeps its fundraising cost at about 30% of the total contributions that it receives after program allocation.

C. The Successful Fundraising Activities That Support DAV's Service Programs Require Unprofitable "Donor Acquisition" Campaigns That Would Be Threatened by the Attorney General's Position.

DAV's success in financing its programs does not change the fact that fundraising is not easy. One of the main problems is that donors come and go. Whether because of death, economic circumstances, ennui, or diversion of resources to other organizations, a charity will typically lose a significant percentage of its active donor base each year. For example, DAV has the support of about 8,000,000 active donors at any one time, but loses about 20% of those (1.6 million) each

year. Unless those donors are replaced, DAV's financial support could not possibly remain at its current levels and would quickly fall to a point where existing programs could no longer be funded.[2]

To replace the 1.6 million donors that it loses annually through attrition, DAV sends approximately 30 million pieces of "donor acquisition mail." These are solicitations sent to persons who are not currently donors to DAV. Acquisition mail campaigns are expensive and DAV does not even expect to recover the cost of such a campaign from the campaign itself. Viewed in isolation, these campaigns produce little, if any, net revenue to DAV. The response rate on acquisition mail campaigns is much lower than on mailings to existing donors, with the result that it may well "cost more than a dollar to raise a dollar."[3]

Without donor acquisition activity a charity such as DAV would soon wither and eventually die, along with its service programs. *See Schaumburg*, 444 U.S. at 632 (without solicitation of financial support, "the flow of . . . information and advocacy would likely cease"). But how could DAV defend against a lawsuit that challenged an acquisition mailing as fraudulent? By conducting a longitudinal analysis of contributions from donors acquired in the particular mailing to show its overall and ultimate profitability, thereby delaying resolution of the suit for years? By challenging the Attorney General's definition of "campaign?" By pointing to the educational and other mission-related objectives that the campaign achieved? There is no good answer.

[2] The Attorney General appears to underestimate dramatically the effort and expense required to maintain, much less expand, a donor list. *See, e.g.*, Amendments to Complaint ¶¶ 68, 69, J.A. 102-03. As detailed herein, fully half of DAV's mailings are dedicated to combating donor attrition. One can imagine that a charity without DAV's well-earned pedigree would find the task even more difficult. Start-up charities may have no existing donor base whatsoever, and thus the ratio of acquisition mailings to donor mailings may be much higher than DAV's.

[3] Max L. Hart, *Ethics, Privacy and Consumer Interests*, DMA NON-PROFIT COUNCIL INFORMATION EXCHANGE 1, 3 (Summer 1994). Mr. Hart, the recognized dean of non-profit fundraisers, managed DAV's direct mail program for three decades. He was recently inducted into the Direct Marketing Association's Hall of Fame, one of only 76 members, including the likes of Leon L. (L.L.) Bean and Aaron Montgomery Ward.

These are but some of the problems that arise from a state-set limit on acceptable fundraising expenditures. However disguised and distinguished, the present case is, as the Supreme Court of Illinois correctly found, about whether fundraising costs can be used as a yardstick for determining whether a charity may exercise its First Amendment rights. This Court has already addressed and answered this question in *Riley, Munson,* and *Schaumburg*. The Attorney General's effort to distinguish those three cases from the case at bar on the ground that the earlier decisions invalidated statutes limiting fundraising costs "even absent any representation by the charitable organization," Reply Br. in Supp. of Pet. for Writ of Cert. at 3, is unpersuasive. The earlier cases involved efforts to legislate limits on permissible costs for solicitations making representations that contributions would serve a charitable purpose.[4] This case involves an effort to achieve the same result by litigation. What is at issue in all the cases is whether a state-imposed limit on charitable fundraising expenses comports with the First Amendment.[5]

[4] For example, the Maryland statute at issue in *Munson* defined "solicit" as meaning "to request [donations] in any form on the plea or *representation* that [they] will be used for a charitable purpose." *See Munson*, 467 U.S. at 960 n.8 (quoting Section 103A(i), Art. 41, MD. ANN. CODE (1982)) (emphasis added).

[5] The Attorney General presumably would permit any percentage cost of fundraising as long as the percentage was voluntarily disclosed at the time of solicitation. This Court has already recognized that such a requirement can be tantamount to muzzling protected expression: "the

II. THE ATTORNEY GENERAL'S POSITION POSES A SERIOUS RISK TO CERTAIN FUND-RAISING ACTIVITIES CARRIED OUT BY DAV STATE DEPARTMENTS AND CHAPTERS.

DAV has chartered fifty-two state departments,[6] which in turn supervise approximately two thousand local chapters. The departments and chapters ("subordinate units") operate indispensable service programs that supplement those run by the National Organization. Many departments and chapters participate financially and in other ways in the van donation and transportation program described above. Some subordinate units operate claims advocacy programs that augment the representation provided to disabled veterans at National Service Offices.

The National Organization severely restricts the type and amount of fundraising that subordinate units are permitted to conduct, and thus itself provides much of the funding to departments and chapters. The fundraising restrictions and consequent "top-down" funding were introduced several years ago. In the past, most departments and chapters had no alternative save to rely on third-party professional fundraisers and, as a policy matter, the National Organization preferred that DAV supporters not receive multiple, apparently competing contacts on behalf of various DAV entities. Presently, departments and chapters may conduct only pre-approved local fundraising activities of limited duration. In addition, some DAV departments and chapters augment their budgets for veterans service programs by running, or lending their names to, thrift store operations. The existence of these long-established participants in the charitable community would be in particular peril if the Attorney General prevailed.

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disclosure will be the last words spoken as the donor closes the door or hangs up the phone." *Riley*, 487 U.S. at 800.

[6] The fifty states, along with the District of Columbia and Puerto Rico.

Charity-related thrift stores raise money by selling donated personal property. Many of these operations—which exist in almost every community, often affiliated with respected charities—would be unable to satisfy the standard of legitimacy that the Attorney General proposes. On one popular thrift store model, a management company solicits donations of saleable personal property in the name of a charity and operates a retail thrift store in the name of the charity. Under this model, the charity takes no risk and assumes no store overhead and, in return for the use of its name, receives a payment from the management company. This payment is often a percentage of the gross revenue of goods sold, and rarely exceeds 10%.[7] Clearly, this 10% is "found" money for a charity, often vital for its programs, not to mention that thrift stores also provide some lower-income persons with access to quality goods that might be unavailable to them otherwise. Despite the long history of thrift stores,[8] in the Attorney General's view, their inherently high overhead costs would make them *per se* fraudulent unless these costs were disclosed to all thrift store donors.

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[7] Some of DAV's departments and chapters are involved in thrift store activities on the model described. The National Organization requires that the management companies return to the DAV entities a minimum of 10% of the gross revenue generated from the sale of donated goods. Although this percentage may appear low, it is in fact a fairly stiff requirement. In California, for example, the average percentage paid to all reporting charities engaging in thrift operations on this model is 8.44%, with many receiving far less than that. CAL. ATT'Y GEN. SUMMARY OF CHARITABLE SOLICITATIONS BY COMMERCIAL FUNDRAISERS, at 10-11 (March 2001).

[8] DAV is aware that certain thrift stores have received unfavorable publicity due to poor management or questionable practices. Nonetheless, most thrift stores, like most charities, operate properly and make a genuine effort to effect their mission.

III. GOVERNMENT NEED NOT REGULATE FUNDRAISING COSTS, AS DONORS CAN, AND DO, INVESTIGATE THE FINANCIAL PERFORMANCE OF CHARITIES.

Governmental efforts to control the fundraising costs of charities are usually, as here, cloaked with the mantle of consumer protection. Yet, when First Amendment considerations are involved, regulation must often give way to right. This was certainly the basis for the Court's suggestion that "less intrusive" measures than percentage limitations be implemented to root out charitable fraud. *Schaumburg,* 444 U.S. at 637. The Attorney General's weapon of choice—fraud litigation—is hardly less intrusive than the methods of regulation that this Court struck down in *Riley, Munson,* and *Schaumburg*. *Cf. Riley,* 487 U.S. at 794 (noting that the threat of litigation over the reasonableness of a fundraising fee unnecessarily chills protected First Amendment activity). Either way, a charity is subject to enforcement activity simply by virtue of its fundraising costs.

Even assuming, *arguendo,* that donation decisions are affected by a contributor's knowledge of the fundraising costs of the involved charity, there are less intrusive and less paternalistic methods of protecting donors than by silencing charities. Now, more than ever before, donors who want a charity's financial information can get it. There are at least four obvious sources of such information:

A. Charities.

Most reputable charities provide financial reports to donors upon request, often including information above and beyond disclosures that may be required by law. DAV receives and responds to tens of thousands of donor inquiries each year, many of which are specific questions about DAV's finances. These questions range from the general (how much does DAV raise each year?) to the specific (why does DAV put

real postage stamps on return envelopes?).[9] In each case, DAV endeavors to provide a full and accurate answer to the inquiry.

B. State Governments.

This Court pointed out fifteen years ago in *Riley* that "the State may itself publish the detailed financial disclosure forms it requires [charities] to file." 487 U.S. at 800. This statement signals a recognition by the Court that it is desirable that information about a charity's financial performance be available to those donors that wish to examine it. *See Schaumburg,* 444 U.S. at 637-38. Since the decision in *Riley*, the amount and quality of information available to donors from states has increased dramatically.

A vast majority of states, including Illinois, require most charities raising funds within their borders to file initial registration documents and/or annual financial reports. *See Schaumburg,* 444 U.S. at 638 n.12 (noting Illinois' registration and reporting requirements). In most cases, charities must file both.[10] These filings are, of course, available to the public upon request. To facilitate and encourage public access, a number of states require that all solicitations be accompanied by a disclosure of exactly how a potential donor can obtain information about a charity's financial performance.[11] Indeed, since the *Riley* decision, thanks to the

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[9] The answer is that it increases return and ultimately lowers fundraising costs.

[10] The Multi-State Filer Project, a joint undertaking of the National Association of State Charities Officials and the National Association of Attorneys General aimed at standardizing registration requirements, reports that forty states currently have such requirements. www.nonprofits.org/library/gov/urs/index.html

[11] Florida, Maryland, Michigan, Mississippi, New Jersey, New York, North Carolina, Pennsylvania, Virginia, Washington and West Virginia impose such a requirement.

Internet, donor access to this data has become even easier. Some states make required charity filings, or the data from them, available on government websites.[12] Ironically, at this writing, Illinois does not require any disclosure concerning the availability of financial records, nor does it publish filings on its website, which remains "under construction."

C. Federal Government.

In addition to making charities' tax returns available through the Internal Revenue Service, 26 C.F.R. § 601.702(d)(3), the federal government has also issued regulations imposing obligations on charities to facilitate donor access to, and inspection of, financial information. *See* 26 C.F.R. §§ 301.6104(d)-1(a), 301.6104(d)-2(b). These regulations implement 26 U.S.C. § 6104(d) and detail the obligations of tax exempt organizations to make their financial information available to the public, and the methods of meeting those obligations. The thrust of the regulations is to ensure broad and easy access by the public to both an organization's application for tax exemption and its recent financial reports filed on Internal Revenue Service Form 990.

D. Private Organizations.

Finally, several "watchdog" organizations with their own publications and websites compile and analyze charities' financial data for the donating public.[13] These agencies pay

[12] Three of several possible examples are Washington (www.secstate.wa.gov/charities), New Mexico (www.ago.state.nm.us/charity/charity.htm) and California (www.caag.state.ca.us/charities).

[13] One such influential "watchdog" organization is the BBB Wise Giving Alliance ("Alliance"), the result of a merger of the National Charities Information Bureau and the Council of Better Business Bureaus' Foundation and Philanthropic Advisory Service. In addition to its various print publications, the Alliance makes many of its analyses available online at www.give.org.

particular attention to the ratios of a charity's total income to its program-related expenditures and its fundraising costs, so that a donor wishing to use those ratios as a yardstick for determining whether to make a contribution will find easy access to the information through such organizations.

This Court recognized long ago that promoting the disclosure of the finances of charitable organizations would assist states in preventing fraud. *Schaumburg,* 444 U.S. at 637-38. The efforts of charities, together with state and federal disclosure requirements and reports by private watchdog agencies, have combined to place an unprecedented quantity of information at the disposal of donors. The advent of the Internet has made access to this information faster and easier than ever. Financial reporting by charities, coupled with mandatory public disclosure of this information, is certainly a "more benign and narrowly tailored option[]" for combating fraud than the course that the Attorney General advocates. *Riley,* 487 U.S. at 800. "Such measures may help make contribution decisions more informed, while leaving to individual choice the decision whether to contribute to organizations that spend large amounts on salaries and administrative expenses." *Schaumburg,* 444 U.S. at 638.

CONCLUSION

For the reasons set forth above, DAV requests that the Court affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

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